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**FEE EXEMPT—Gov. Code § 6103**

**SUPERIOR COURT OF THE STATE OF CALIFORNIA**

**FOR THE COUNTY OF LOS ANGELES**

ADRIAN RISKIN, an Individual;

Petitioner,

vs.

CITY OF LOS ANGELES, a Charter City and Municipal Corporation; and DOES 1 THROUGH , INCLUSIVE,

Respondents.

**CASE NO. 19STCP05266**
[Department 85, Honorable James C. Chalfant.]

**RESPONDENT'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PETITION FOR WRIT OF MANDATE; DECLARATIONS OF B. O'CONNOR, C. DENNIS, AND B. WILSON; REQUEST FOR JUDICIAL NOTICE, IN SUPPORT THEROF**

Date: November 11, 2020
Time: 1:30 pm
Dept.: 85
JUDGE: HON. JAMES C. CHALFANT

RESPONDENT City of Los Angeles hereby submits the following Memorandum of Points and Authorities, and the declarations of Brian O'Connor, Charlene Dennis, and Bethelwel Wilson in support thereof, in opposition to Petitioner's Petition for Writ of Mandate compelling disclosure of records in MBOX format.

## MEMORANDUM OF POINTS AND AUTHORITIES

### I. BACKGROUND

To engage petitioner in the realm of the California Public Records Act ("CPRA") is to entangle oneself with an implacable force of nature, a requester for whom no request is too burdensome or voluminous to satisfy. Apprising Petitioner that his CPRA requests constituted 40 percent of LAPD's caseload, Captain Bryan Lium, on August 6, 2020 wrote: "[petitioner] frequently submit(s) CPRA requests to the Department that are complex, vague, and/or overbroad, which create considerable burdens for the Department's staff to fulfill their other work responsibilities and efficiently serve other members of the public." (O'Connor Decl. ¶ 4 Ex. A.) Since July 1, 2019 to the present, petitioner has submitted 275 requests to LAPD, 130 requests to the City Attorney's Office, 120 requests to LAX, 65 requests to the City's IT department ("ITA"), and approximately 30 requests to the City Council. (O'Connor Decl. ¶ 3**;** Wilson Decl. ¶ 2; Dennis Decl. ¶ 11.) Since February 2019 to the present, Mr. Riskin has also filed 10 lawsuits against the City over CPRA disputes. (Wilson Decl. ¶ 2.)

In the instant action, petitioner seeks an order that would dictate how the City processes its electronic records under Section 6253.9 of the Government Code. City's protocol for producing electronic records has been carefully developed to comply with the CPRA and reflects the industry standard. Petitioner is not entitled to dictate how City processes its electronic records. Moreover, requiring City to reproduce thousands of emails would be unduly burdensome. This petition for relief should be dismissed to the extent it seeks relief not authorized by the CPRA. Alternatively, should relief be granted, City requests that the court narrowly tailor its order to only requiring the City to remedy defects on particular pages of the preexisting production identified by petitioner.

### II. STATEMENT OF FACTS

On December 13, 2019, petitioner filed the instant mandamus action after receiving dissatisfactory responses to the "Huizar Request" (submitted in November 2018), the "Forms Request" (submitted in 2019), "Garcetti Request" (submitted in February 2016); and the "Williams-Westall Request (submitted in August in 2019). Upon receipt of petitioner's writ, counsel for City directed petitioner's requests to ITA for processing. The Forms Request was processed rather quickly since the

ITA search yielded less than 200 responsive documents and required no format conversion. As to the other three requests, ITA sent to the City Attorney search results via individual mbox links which counsel for City submitted to Zylab, an outside vendor under City contract that extracts files from mbox and converts them to pdf for purposes of redacting and tagging. Once the pdfs are redacted and tagged for responsiveness and/or privilege, the requester receives a single file or multiples files of the final nonexempt production in a single or in multiple pdf files depending on the size of the production. If a requester disputes a privilege designation, the custodian can easily locate the disputed record by its designated tag. The review features in Zylab enable custodians to quickly sort through voluminous records common to broad CPRA requests and complex litigation. In this instance, because the Williams-Westall search produced 1,616 potentially responsive emails, the Huizar Request produced 19,600 potentially responsive emails, and the Garcetti Request produced 9,112 potentially responsive emails (narrowed request), it took counsel for City approximately 5 months to review and redact documents for privilege and to remove duplicates. City produced pdfs comprised of 1,115 pages emails responsive to the Westhall request, 3,201 pages of emails responsive to the Garcetti request, and 6,498 pages of emails responsive to the Huizar request. City ultimately produced a reduced number of emails to petitioner, not because the city purposefully overestimated the number of records, but because removal of duplicates and privileged withholdings were required: (Wilson Decl. ¶¶ 3-5.)

In back-and-forth conversations with City, petitioner raised the issue of records being produced in MBOX. Counsel for City explained that City has never produced redacted emails in MBOX although has, when requested, produced in MBOX emails that do not require review or redaction. To explain the City's limitations further, counsel for City arranged for opposing counsel to speak with an ITA supervisor, who explained that City had not yet acquired the capability to review or redact emails in MBOX; hence, City's reliance on converting MBOX files to PDF for review and redaction. (Wilson Decl. ¶ 6; Dennis Decl. ¶ 8.) At no point during the meet-and-confer process or nowhere in this petition has petitioner informed City of specific pages in the City's productions that were illegible or otherwise deficient. City did inform petitioner, through counsel, that if he desired metadata, City is able to generate metadata files in a separate load file that can be reviewed and redacted. (Wilson Decl. ¶ 7.) The City's offer was never accepted, as petitioner insisted on all data being produced in MBOX. To the extent

petitioner has identified deficiencies in his declaration specific pages where of City's production where attachments in native format are missing or pages are illegible, City is willing to work with Petitioner to cure these defects as well as provide non-exempt metadata in pdf format, as previously offered by City.

On October 23, 2020, counsel for City learned that the Zylab software used to process the three email requests at issue possesses the capability to reproduce the production as follows: non-redacted emails in a range of native formats, attachments in native format, metadata, and redacted, text-searchable emails in PDF format. While this method of production is possible in the instant case, it may not be possible in others, as no City employees outside a few City Attorneys have access to Zylab software (due to licensing costs), and each request for MBOX or native format must be evaluated on a case-by-case, factoring in the nature of the request, technological feasibility, and burdens placed on the department producing the records. (Wilson Decl. ¶ 8; Ex. A.)

## III. ARGUMENT

### A. City's PDF production is lawful under 6253.9, because it is the format used by City to create copies for its own use and provision to other agencies.

This dispute between Petitioner and Respondent regarding the format in which an agency is obligated to produce a record is somewhat understandable given the lack of state-level judicial guidance regarding the issue presented to the court. Contrary to petitioner's view, 6253.9 does not give petitioner the power to override the City's well-established production methods with his own production preferences – an interpretation supported by a plain reading of the 6253.9.

Section 6253.9 obligates agencies to provide records, when requested in electronic format, "in any electronic format in which it holds the information." 6253.9(a).] Further, "each agency shall provide a copy of an electronic record in the format requested if the requested format is one that has been used by the agency to create copies for its own use or for provision to other agencies" [6253.9(b).]

California courts have long recognized that the language used in a statute or constitutional provision should be given its ordinary meaning, and "[i]f the language is clear and unambiguous there is no need for construction, nor is it necessary to resort to indicia of the intent of the Legislature (in the case of a statute) or of the voters (in the case of a provision adopted by the voters)." (*Lungren v.*

*Deukmejian* (1988) 45 Cal.3d 727, 735. To that end, courts generally must "accord[] significance, if possible, to every word, phrase and sentence in pursuance of the legislative purpose," and have warned that "[a] construction making some words surplusage is to be avoided." (*Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1387. In cases of uncertain meaning, courts may also consider the consequences of a particular interpretation, including its impact on public policy." (*Wells v. One2One Learning Foundation* (2006) 39 Cal.4th 1164, 1190.)

Section 6253.9 was amended to reflect its current form in September 30, 2000 following the passage of AB 2799, which, among other reforms, proposed eliminating the discretion of public agencies to provide computer records in any format determined by the agency. Further, AB 2799 required an agency to provide computer records in any format that it currently uses. (RJN; Wilson Decl. ¶ 1, Ex. A.) With significant advances in technology that occurred in 2000, there was a growing public appetite for agencies to produce records in an electronic format. The concern by the bill sponsor (California Newspaper Publisher's Association) was that agencies, instead of providing requesters with the cd or disk the electronic records were stored on, agencies were choosing to print the records for which the public paid. The printing costs, especially in cases of voluminous records, practically made the records inaccessible to the public. AB 2799 was crafted to avoid this unfair outcome. (RJN; Wilson Decl. ¶ 1, Ex. B.)

The language of section 6253.9 obligates City to provide petitioner with emails in any electronic format in which City holds them. PDF is an electronic format in which City holds the Google mails; therefore, City's provision of emails in PDF format complies with 6253.9, the legislative history of which was concerned with agencies choosing in bad faith a format that effectively deny requesters access to nonexempt public information. In distinction, City's PDF productions have not denied petitioner access to any non-exempt public information. Likewise, a low-quality production, as alleged by petition does not amount to denial of access. Entitlement to a high-quality or organized production is not a cognizable right under the CPRA.[1] A closer examination of petitioner's complaints about City's production quality immediately illuminates their hollowness, as City-generated pdfs are generously

[1] In FOIA cases, the federal courts have held agencies do not have a duty to arrange responsive records in a particular order. (See, *Dent v. Exec. Office for U.S. Attorneys* (2013) 926 F. Supp. 2d 257, 256; Shapiro v. U.S. Dep't of Justice (2014) 37 F. Supp. 3d 7, 20.)

analyzed, published, and archived by petitioner on the two social media websites he administers: http://michaelkohlhaas.org/wp/about-us/ and https://twitter.com/dotkohlhaas?lang=en.[2].

Despite Petitioner's attempt to denigrate City's production methods, producing electronically stored information in PDF format has been standard practice in the realm of federal litigation for at least a decade.[3] Finally, adopting petitioner's interpretation of section 6253.9 would produce a poor policy outcome because it could lead to lengthier production times by agencies - and possibly more mandamus lawsuits– as requesters seek challenging formats in which agencies difficult format are unable to produce due to technical limitations.

In sum, City's PDF format is lawful under section 6253.9 because it is the format in which the City holds the requested records and is a format that complies with federal guidelines and practices. If the court were to find that the City's production violates section 6253.9, City requests that the court's order be narrowly tailored to the production capabilities of the Zylab software used to process this production.

**B. Requiring the City to Reproduce the Entire Production is Unduly Burdensome and Duplicative**

In providing Petitioner with records in an electronic format – pdf – in which it holds and distributes records internally and to other agencies, the City has satisfied its obligations under California Government section 6253.9. Acquiescence to Petitioner's insistent demands for MBOX format would significantly impair City's operations, as converting City's everyday production process to reflect Petitioner's preferences would require an infusion of additional money, resources, and staff City does not have at its disposal. (Dennis Decl. ¶ 9.)

The CPRA provides a justification for withholding records where on the facts of a particular case the public interest served by not disclosing the record clearly outweighs the public interest served. (Cal. Gov. C. § 6255; *American Civil Liberties Union Foundation v. Deukmejian* (1982) 32 Cal.3d 440, 452.)

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[2] In a tweet Petitioner posted on October 5, 2020, he extolled the attributes of an 800-page pdf document he had received from City (*See*, https://twitter.com/DotKohlhaatus/1313213488932614145/photo/1). Petitioner also maintains an extensive archive of City-produced emails at http://michaelkohlhaas.org/wp/about-us/.

[3] *See* The Sedona Conference Glossary: E-Discovery & Digital Information Management (Fourth Edition), 15 SEDONA CONF. J. 305, 323, 337, 341, 347, 359 (2014) (containing definitions of "Electronic Image," "Load File," "Native Format," "TIFF," and "Portable Document File (PDF)").

The nature of the records, how directly the records contribute to the public's understanding of government, and whether there are alternative, less intrusive means of obtaining the information sought are factors that must be considered in assigning weight to the public interest in favor of disclosure. [*Humane Society of the United States v. Sup. Ct.* (2013) 214 Cal. App.4th1233, 1268.); *Connell v. Sup. Ct.* (1997) 46 Cal. App. 4th 601, 616; *San Jose v. Sup. Ct.* (1999) 74 Cal. App.4th 1008, 1020.]

Because the public has an interest in the cost and efficiency of government, a public agency's expense and inconvenience associated with making a record available to the requester must be factored into this balancing. (*See Deukmejian, supra*, 32 Cal.3d at 453.) "To refuse to place [expense and inconvenience] on the section 6255 scales would make it possible for any person requesting information for any reason or for no particular reason, to impose upon a governmental agency a limitless obligation. Such a result would not be in the public interest." (*Ibid*.) In *Deukmejian*, disclosure would have required the public agency to segregate exempt information from non-exempt information on 100 individual records where there was no clear delineation of confidential material. (*Id.,* at 453.) The Supreme Court found that the public agency's burden in producing the records clearly outweighed whatever benefit the disclosure of the non-exempt information would have provided. *(Ibid*.)

Here, the balancing test weighs in favor of denying a reproduction of thousands of emails in the manner suggested by petitioner and petitioner's expert. Receiving essentially duplicate emails would not add to the public's understanding of government any more than the City-produced PDF files already in petitioner's possession. It took counsel for City five months to review the instant production. ITA predicts the amount of time to review petitioner's requests would triple if City were to follow petitioner's production directive. Multiply this effect across the more 600 hundred CPRA requests petitioner has filed since July 1, 2019, and the result is City departments deprived of any capacity to conduct their essential duties, among which include processing requests received from other public members. With no tools in City's Google Vault to redact emails in MBOX format and insufficient personnel to carry out petition my-way-or-the-highway production preference, City is placed in the impossible position of providing petitioner with no documents at all or documents in PDF format, which is what it did here. Lastly, in asking the City reproduce thousands of emails he has generically alleged as deficient, petitioner is failing to avail himself of less intrusive means of obtaining the nonexempt

information. Said means would involve petitioner communicating to City, as he has informed City belatedly in his declaration, the specific portions areas in the production that are defective so that City could fix errors where necessary, saving time, money, and resources. If petitioner were to accept City's offer to provide the production in accordance with the capabilities of the Zylab software, as expressed above, the burden on the City would be considerably lessened.

## IV. **CONCLUSION**

Based on the foregoing, City requests that the court denies mandamus relief on the basis that City has met its obligations to provide petitioner with electronic records in the format held by the City. To the extent the court orders City to reproduce the instant production, City requests that it only be required to reproduce the production in line with the technical capabilities of the Zylab software described herein.

Dated: October **24** , 2020

MICHAEL N. FEUER, City Attorney
VALERIE L. FLORES, Managing Assistant City Atty
BETHELWEL WILSON, Deputy City Attorney

By: Bethelwel Wilson
BETHELWEL WILSON

**PROOF OF SERVICE -- (VIA VARIOUS METHODS)**
**CASE NO. 19STCP05266**

I, the undersigned, say: I am over the age of 18 years and not a party to the within action or proceeding. My business address is 200 North Main Street, Suite 800, Los Angeles, California 90012.

On, October 24, 2020 I served the foregoing documents described as: **RESPONDENT'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PETITION FOR WRIT OF MANDATE; DECLARATIONS OF B. O'CONNOR, C. DENNIS, AND B. WILSON; REQUEST FOR JUDICIAL NOTICE, IN SUPPORT THEROF** on all interested parties in this action by placing copies thereof enclosed in a sealed envelope addressed as follows:

[ ] BY MAIL - I deposited such envelope in the mail at Los Angeles, California, with first class postage thereon fully prepaid. I am readily familiar with the business practice for collection and processing of correspondence for mailing. Under that practice, it is deposited with the United States Postal Service on that same day, at Los Angeles, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postage cancellation date or postage meter date is more than one (1) day after the date of deposit for mailing in affidavit; and/ or

[ ] BY PERSONAL SERVICE – (☐) I delivered by hand, or (☐) I caused to be delivered via messenger service, such envelope to the offices of the addressee with delivery time prior to 5:00 p.m. on the date specified above.

[ ] BY OVERNIGHT COURIER - I deposited such envelope in a regularly maintained overnight courier parcel receptacle prior to the time listed thereon for pick-up. Hand delivery was guaranteed by the next business day.

**[X] BY ELECTRONIC SERVICE**: Based on a court order or an agreement of the parties to accept service by electronic transmission, I caused the documents to be sent to the persons at the electronic notification addresses listed below. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made. I declare under penalty of perjury that the foregoing is true and correct. Executed on October 24, 2020, at Los Angeles, California.

– Bethelwel Wilson